

Legal Alert – 31 August 2012

NEW PSA LAW AMENDMENTS BILL



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On 30 August a new Bill #11119 was registered with the Verkhovna Rada (Parliament) of Ukraine, introducing a number of important amendments into the PSA Law and a few other laws, in particular with regards to the conversion of the existing Subsoil Licenses into production sharing agreements (“PSA”).

The Bill accumulates a long list of various amendments proposed in the past few years by the investment and legal community, including by our firm, as well as amendments needed for the Government of Ukraine (“GOU”) to move forward on the two PSAs currently under negotiations (Olesska and Yuzivska). The Bill requires a thorough analysis, but some of the most important highlights are listed below:

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1. Conversion of the existing Subsoil License into a PSA

According to the existing PSA Law, a conversion of the existing Subsoil License into a PSA is possible without a tender, but there is no procedure provided, and the possibility for such a conversion is expressly allowed only for the holders of Subsoil Licenses (“License-Holder”), which in most cases are Ukrainian State-owned or private companies. There is no mention of a possibility to bring an investor into the conversion and make the investor a party to the PSA together with the License-Holder. There is a far-fetched opportunity for interpretation of this provision in favor of allowing an investor to participate in the conversion because of stipulation that the License-Holder can conclude a bilateral (i.e. the License-Holder and the GOU) or a "multilateral" PSA. It is possible to interpret the “multilateral” PSA, as the one in which another party-investor can enter into, along with the License-Holder. In this case the PSA will be concluded on one side by the License-Holder and another party-investor and on the other side by the GOU.

The Bill, unfortunately, stopped short of expressly legitimizing participation of an investor in the conversion and does not expressly allow an investor to become a party to the PSA. At the same time the Bill appears to support our “multilateral” PSA interpretation, mentioning it several times, and adding that in such a case, after “multilateral” PSA is concluded, a new Subsoil License will be issued in the name of all parties to the PSA.

We assume that the investment and legal community will be able to propose comments to the Bill, including a provision that would directly allow an investor to participate in the conversion and become a party to the PSA along with the License-Holder.

Finally the Bill prescribes a very general and brief conversion procedure, requiring that the conversion application to the GOU is accompanied by the proposals of the PSA Interagency Commission and specifying some procedural deadlines.

2. Waiver of Sovereign Immunity

The Bill proposes to restore the provision on waiver of sovereign immunity by the State in the PSA Law, which was stipulated in the original PSA Law, but later invalidated by the Constitutional Court. This time, the Bill proposes to make such a waiver a right, but not an obligation by the State. In any case this is a major improvement in terms of strengthening international protection mechanisms available to the investor.

3. Separating PSAs from the PPP Law

The Public Private Partnership (“**PPP**”) Law was adopted much later than the PSA Law and listed PSAs as a type of PPP, which carried multiple risks for PSAs because of conflicting rules in the PPP Law and in the PSA Law. The Bill separates PSAs from the PPP Law, removing these risks.

4. The PSA Taxation Amendments Bill

In addition to the above Bill #11119, another Bill #11120 was introduced on the same date stipulating a number of PSA taxation amendments.

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